No. 14,389

IN THE

United States Court of Appeals

For the Ninth Circuit

TRIPLE "A" MACHINE SHOP, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

J. THADDEUS CLINE,
732 Monadnock Building, San Francisco 5, California,
Proctor for Libelant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 14,389

IN THE

United States Court of Appeals

For the Ninth Circuit

TRIPLE "A" MACHINE SHOP, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

EXPLANATORY STATEMENT RELATIVE TO THE DESIGNATION OF THE EXHIBITS IN EVIDENCE.

It will be noted that in the printed Transcript of Record, almost all of the exhibits are designated by more than one number or letter. This somewhat unusual practice arose in the following manner.

In the pre-trial proceedings that were had in the Court below, all but one or two of the exhibits appearing in the Transcript were set forth in the Pre-Trial Order under the heading "Pre-Trial Exhibits" (Tr. p. 74). Before trial it was agreed between counsel for both parties that all of the said pre-trial exhibits would be introduced in evidence at the trial as joint exhibits and bear the same numbers as were used in the said pre-trial order.

Although this procedure was approved by the Trial Court, the said parties were later met with the Court's demand, which made it necessary to introduce certain documents individually. In order to avoid confusion herein, the printed transcript designates the said exhibits not only by the numbers used in the pre-trial order, but, also, the number or letters applied to the said documents when introduced in evidence or discussed during the trial in the Court below.

STATEMENT UNDER RULE 18-2(b) RE JURISDICTION OF THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS.

While the libel in the above entitled action contains three causes of action, Libelant filed an acknowledgment of full satisfaction of the amounts claimed in its first and second causes of action. In so far as the trial and this appeal are concerned, Libelant's action is based solely upon its third cause of action.

The said third cause of action is for the reasonable value of the labor and materials furnished by Libelant in making certain repairs on five lifeboats owned by Respondent.

Claims for repairs of government-owned vessels come within the admiralty jurisdiction of the United States District Court.

Title 46; Section 971;

Title 46; Sections 742 and 743;

Title 28; Section 1333;
Admiralty Rule 13.

The United States Court of Appeals has jurisdiction of all appeals from final decisions of the United States District Court.

Title 28; Section 1291.

STATEMENT OF THE CASE AND GENERAL STATEMENT OF THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

I. Did Libelant's bid to make lifeboat repairs, when accepted by Respondent, constitute the contract between the parties?

II. Can the findings of fact be sustained, in that the findings:

a. Omit material evidence;

b. Are contrary to the evidence;

c. Contain legal conclusions.

III. Can the conclusions of law be sustained, in that the conclusions:

a. Are contrary to law;

b. Are based upon unsupported findings of fact.

IV. Did the Court err in denying Libelant's motion to amend Findings of Fact and Conclusions of Law and motion for new trial?

V. Are the order for judgment, conclusions of law, final decree, and the final decree as modified contrary

to law and the evidence, and at variance one with the other?

For the purpose of clarity and uniformity, Triple "A" Machine Shop, Inc., libelant and appellant herein, will be referred to herein as Libelant, and the United States of America, respondent and appellee herein will be herein referred to as Respondent.

Libelant is a San Francisco firm, engaged solely in ship repair work. In order to be eligible to bid on government ship repair work, Libelant, along with all other contractors, was required to and did sign a Master Contract (Joint Ex. 1, Tr. p. 25) in February 1950. The said master contract set forth general provisions covering the rights and duties of the respective parties as to any repair jobs that might thereafter be awarded to Libelant.

Subsequent to the execution of said Master Contract, Respondent circulated among the qualified contractors an Invitation to Bid (Joint Ex. 3, Tr. p. 51), whereby bids were solicited for the repair of five lifeboats. The said invitation was accompanied by a set of specifications (Joint Ex. 2, Tr. p. 34) covering said repair job. The said specifications are in two parts, the first two pages being in the nature of a

preamble setting forth general provisions relative to the job and a statement that it is intended that the said lifeboats shall be put in complete repair and in first-class operating condition. The second part of said specifications is under the heading of *"Category A Items"* under which the specific items of repairs for each lifeboat are set forth in detail. These items were prepared by the government planner after he had checked over the lifeboats to determine what repairs were needed.

In government ship repair work *"Category A Items"* are understood and intended to mean the repairs which the contractor will definitely be required to make. These items of repair are explicitly set forth under the heading *"Category A Items."* On the other hand, Category B and Category C items are those items of repair that are uncertain, or unknown, or that the contractor may not be required to perform.

Along with said Invitation to Bid, Libelant was furnished with a printed form of bid to be used by Libelant in submitting its bid for said repair job. The said form was prepared for submission of a bid to furnish said *"Category A Items"* which were explicitly listed in the said specifications, as aforesaid. The said bid form was also prepared for the submission of a bid for "Category B Items" and "Category C Items."

The said lifeboats were so constructed that the metal floors, floor boards and buoyancy tanks concealed most of their interior. Whether or not repairs beyond those specified in said *"Category A Items"*

would be required could not be determined until after the said floors and tanks had been torn out and an inspection had been made by the Coast Guard inspector. For this reason, Libelant submitted its bid to furnish *"Category A Items"* only.

Libelant was low bidder and its said bid to furnish *"Category A Items"* only was accepted by Respondent without question or qualification. Libelant promptly proceeded with its contract to furnish and install all of the repairs specified in its said bid, namely, the repairs listed and described in the specifications under the heading *"Category A Items."* After the floors and tanks were torn out, Respondent's inspector determined that other and additional repairs were necessary to put said lifeboats in proper condition. It was found that the old tanks had deteriorated and required replacement. The replacement of the tanks was accomplished on a field order at the agreed price of $9,490.00. This extra repair work was the basis of Libelant's second cause of action, which has been paid in full and is not now an issue in this case.

The inspector found other and additional repairs that he deemed necessary to put the said lifeboats in proper condition. Respondent thereupon demanded that Libelant furnish and install said additional repairs without compensation therefor. Under said Master Contract, Respondent had the right to require Libelant to install repairs that were not included in its bid, and Libelant had no right to hold up the job pending settlement of the amount to be

paid for such additional repairs. Libelant therefore proceeded to furnish and install said extra repairs, but did so under express notice to Respondent that Libelant would require payment of the reasonable value of said extras.

The said extra work was of the reasonable value of $6,342.00. No part of said extra repair work is included in the *"Category A Items"* in said specifications. Respondent has refused to pay the said reasonable value of said extra repair work or any part thereof.

Before filing the above entitled action, Libelant pursued and exhausted its administrative remedies provided in said Master Contract. Thereafter Libelant filed its libel herein in which the third cause of action is for the said reasonable value of said additional repairs, namely, $6,342.00.

Thereafter Libelant filed herein an acknowledgment of full payment of the amounts claimed in its first two causes of action, leaving its third cause of action as the only matter in controversy before the Court. Subsequently the parties by stipulation agreed that the said additional repairs were of the reasonable value of $6,040.00.

Pre-trial procedure was followed in this case. All material facts were agreed to by the parties, and the same were incorporated in and adopted by the Court in its Pre-Trial Order. Thereafter the action went to trial on the third cause of action on one principal question of law, namely:

1. Did Libelant's bid, when accepted by Respondent, constitute the contract of the parties?

a. If the contract arose out of Respondent's acceptance of Libelant's offer to furnish *"Category A Items"* for the contract price of $3,775.00, how did Libelant become legally charged with the duty of furnishing subsequently discovered *"Category B Items"* of the value of $6,040.00 without compensation therefor?

Prior to the trial Respondent filed a motion to dismiss the above entitled action on the ground that the decision of the administrative appeal board was final and conclusive. The said motion was argued and briefed, and thereafter the Court (Judge Louis E. Goodman) made its written order reserving a ruling on said motion until after the trial. Final decision on said motion was reserved on the ground that the Court did not have before it sufficient facts to determine whether the controversy between the parties arose out of the said plans and specifications. The Court clearly indicated, however, that the motion to dismiss would have to be denied if the evidence introduced at the trial established that said controversy was one that came within the provisions of Article 5 (J) of said Master Contract. This was by reason of the fact that said Article 5 (J) does not provide that decisions made thereunder are final or conclusive.

At the conclusion of the trial the Court made its Order for Entry of Judgment in favor of Respond-

ent. The trial Court appears to have adopted and followed the reason expressed in Judge Goodman's said order, in that the trial Court did not dismiss the action, but to the contrary, rendered judgment in favor of Respondent. The said order for judgment in favor of Respondent raises Libelant's next point on appeal, namely, *that said order for judgment is contrary to law, and is not supported by substantial evidence.*

Thereafter the Court made its Findings of Fact and Conclusions of Law, which give rise to Libelant's second principal question on appeal, namely:

I. The Findings of Fact are contrary to law and the evidence.

A. The Findings of Fact (Tr. p. 93) not only contain conclusions of law, but what is more serious, the said conclusions of law are erroneous.

1. Finding VII contains the erroneous conclusions of law that by its bid Libelant did "offer and agree . . . to completely repair and recondition, both mechanically and structurally, the five (5) lifeboats specified in the Invitation to Bid No. P 51-36 and Specification No. MSTSP 51-64 at a total price of $3,775.00 . . ."

2. Finding XI contains the erroneous conclusions of law that the additional repairs which Libelant was required to furnish "did not comprise extra work to be performed by the libelant".

B. The Findings of Fact are not supported by the evidence.

1. Finding VI is not only not supported by the evidence, but the evidence is directly to the contrary.

2. The last two and one-half lines of Finding VII are directly contrary to the evidence, viz., that Libelant's said "bid was submitted on a basis of computations as to work needed to be done . . ."

3. That the statement contained in Finding XI is contrary to the evidence, viz., "that all such items of repair were visible and subject to inspection and ascertainment by libelant's representative prior to submission of libelant's bid."

C. That the Findings of Fact omit essential facts established by the evidence and the Pre-Trial Order.

1. Finding V quotes only selected portions of the preamble of the specifications and omits the only portion of the specifications that was included and referred to in Libelant's said bid, namely, the *"Category A Items"*, which constituted the last three pages of said specifications.

2. That the Findings omit all or the essential portions of the "Agreed Facts" as approved by the parties and adopted by the Court in its Pre-Trial Order. That more particularly the Findings of Fact omit the following material facts established in this case by the said Pre-Trial Order, (Tr. p. 68) namely, (quoting from the Agreed Facts set forth in the said Pre-Trial Order):

> "7. That on September 29, 1950 in response to Invitation to Bid No. P 51-36, Triple 'A' Machine Shop, Inc., libelant herein, sub-

mitted its bid for repairs to five lifeboats for a total price of $3,775.00."

"8. That on October 2, 1950, Military Sea Transportation Service Pacific accepted the bid of Triple 'A' Machine Shop and issued 'Job Order No. 10' under Master Contract MST-235 to Triple 'A' Machine Shop, libelant herein, authorizing commencement of repairs to five lifeboats in accordance with Specifications for Repairs No. MSTSP 51-64."

"12. That during the months of October and November 1950 *libelant was required* by Military Sea Transportation Service Pacific *to perform additional work* and furnish labor and materials to effect certain repairs to the said lifeboats."

"13. That although claim has been made by Triple 'A' Machine Shop. libelant herein, against the respondent United States of America, for the 'reasonable value' of the said work performed in the alleged amount of $6,342.00 as set forth in libelant's Third Cause of Action, such sum has not been paid and respondent ('libelant' corrected to 'respondent' by the Court) has failed and refuses to pay said sum."

"14. That in October 1950 Triple 'A' Machine Shop, libelant herein, was required to perform the *aforesaid additional work* on the said five lifeboats and libelant was advised by the Contracting Officer, Military Sea Transportation Service Pacific, that *such additional work* was covered under the Specifications for Repairs No. MSTSP 51-64, Job Order No. 10 and Master Ship Repair Contract MST-235. That libelant proceeded with said work under written protest

and notice to the Contracting Officer that Libelant would require payment of the reasonable value of *said additional work.*"

"17. That the claim of Triple 'A' Machine Shop, libelant herein, for payment for the *additional work* performed on the five lifeboats was appealed to the Contract Advisory Board, Military Sea Transportation Service, by libelant under and pursuant to Article 5(j) and Article 14 of said Master Contract No. 235."

"18. That the Contract Advisory Board, Military Sea Transportation Service, declined to consider said appeal under Article 14, but determined under Article 5(j) of the Master Ship Repair Contract MST-235 that the Specifications for Repair No. MSTSP 51-64 and Job Order No. 10 covered in full any and all work which libelant had been required to perform in repairing the said lifeboats, and that libelant accordingly was not entitled to reimbursement for said *additional work.*"

II. *The Conclusions of Law (Tr. p. 102) are contrary to law.*

A. Conclusion No. 1 is contrary to the established rules of law as to what constitutes a contract.

B. Conclusion No. 2 is contrary to law in holding that an administrative determination made pursuant to Article 5(j) of said Master Contract is conclusive on the parties.

C. Conclusion No. 3 is contrary to law in holding that an administrative determination made pursuant

to Article 5(j) of said Master Contract is conclusive and binding on the Court.

D. Conclusion No. 4 is contrary to law and the evidence.

E. The order for judgment in favor of Respondent, with which the Court ends its said Conclusions of Law, is directly opposed to its said conclusions Nos. 2 and 3, in that if said conclusions were legally sound the Court would not have had jurisdiction to grant judgment or make any order other than an order granting Respondent's said motion to dismiss.

On signing said Findings of Fact and Conclusions of Law the Court made and entered its "Final Decree" dated March 10, 1954. This raises Libelant's next point on appeal, namely:

III. *The said "Final Decree" is directly at variance with the Court's said "Order for Entry of Judgment",* in that the said order directed judgment in favor of the Respondent, whereas said "Final Decree" ordered the action dismissed.

Thereafter and within the statutory period, Libelant filed a motion to amend the Findings of Fact and Conclusions of Law, and also a motion for new trial. The said motions were duly argued and taken under submission. Thereafter and before the Court had ruled on said motions, Respondent filed a motion to modify said Final Decree so as to change the same from an order dismissing said action to a judgment in favor of Respondent. Thereafter, the Court made

an order denying Libelant's said motion to amend the Findings of Fact and Conclusions of Law and said motion for new trial. The Court thereupon made a further order granting Respondent's said motion to modify said Final Decree. This raises Libelant's final questions on appeal:

IV. The Court was in error in denying Libelant's motion to amend the Findings of Fact and Conclusions of Law (Tr. p. 104).

V. The Court was in error in denying Libelant's motion for new trial (Tr. p. 105).

VI. The Final Decree (Tr. p. 108), as amended, is contrary to law and not supported by the evidence.

VII. The Final Decree, as amended, is at variance with the Conclusions of Law.

ARGUMENT.

This action went to trial on the third cause of action, wherein Libelant seeks judgment in the sum of $6,342.00 as the reasonable value of certain lifeboat repairs furnished by Libelant, which said repairs were in addition to the repairs specified in its

bid. The said extra repairs which are the subject matter of said third cause of action, and the reasonable value thereof, are as follows: (Exhibit A, Tr. p. 80):

"298 sq. ft. shell plate	$3,600.00
All floors in 4 lifeboats	1,000.00
Approx. 270 sq. ft. #1 lumber for margin boards	352.00
2 Hand gear propelling sockets	90.00
All galvanized iron tank straps	200.00
All aluminum tank straps	50.00
Thwarts (2 renewed)	150.00
Life lines and floats on boats	225.00
116 ft. Splash railing	140.00
24 hanging clips for splash railing	70.00
24 sockets for splash railing	70.00
Renewed 2 plates and 2 doublers which specifications called for fairing and same were found cracked	395.00
Total	$6,432.00"

At the commencement of the trial the parties stipulated that the reasonable value of the aforesaid repairs is $6,040.00 (Tr. p. 89). The said sum is therefore the amount for which Libelant seeks judgment.

The action went to trial with all material facts having been agreed upon by the parties and adopted by the Court in its Pre-Trial Order. The case raised only one question of law to be determined by the Court, namely, what constituted the contract of the parties? It is obvious that Libelant would not be

entitled to judgment for the reasonable value of the above listed repairs if, under its contract, Libelant was bound to furnish said extra repairs without any additional compensation therefor.

Since the trial Court has erroneously ruled that the said additional repairs were within the obligation of Libelant's contract, we must refer back to the elementary rules of contract law as to what constitutes a contract and as to how a contract comes into being.

Civil Code, Section 1549.

"A contract is an agreement to do or not to do a certain thing."

Civil Code, Section 1639.

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."

12 *Cal. Jur.* (2d), p. 208.

". . . Each party has a right to rely on the acceptance as constituting a contract. The party making the offer has a right to understand that the acceptance was according to the terms of the offer, and an acceptance so made cannot be held to have a binding force beyond the terms of the offer."

12 *Cal. Jur.* (2d), p. 216.

". . . Therefore, in order for a proposal and acceptance to constitute a binding contract, the proposal must be squarely assented to. The ac-

ceptance must in every respect correspond with the offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they are stated."

12 *Cal. Jur.* (2d), Section 25, p. 202.

". . . There must be an offer or proposal and an acceptance of it. Through such offer by one of the parties and acceptance by the other a contract between them is created."

To constitute a contract the offer would have to be accepted without the slightest change or modification.

Sackett v. Starr, 95 C.A. (2d) 128.

P. 133 "... Mutual consent is necessary to the existence of any contract, and *one cannot be made to stand on a contract to which he never consented.* (Cummings v. Ross, 90 Cal. 68 (27 P. 62).) There can be no contract unless the minds of the parties have met and mutually agreed. (Marx & Tawolle v. Standard Soap Co., 42 Cal. App. 32 (183 P. 225); Los Angeles etc. Co-operative Assn. v. Phillips, 56 Cal. 539; 6 Cal. Jur. Sect. 24, p. 43.) There *must be an offer* or proposal *and an acceptance* of the same."

Corbin on Contracts, V. 1, p. 259.

"A communicated offer creates a power to accept the offer that is made, *and only that offer.*"

17 *Corpus Juris Secundum,* p. 370.

"One who makes an offer to enter into a contract may do so *on any terms that he may see fit* to make, as long as they are not illegal; and,

if the offer is accepted, such terms are binding on both parties."

In applying the foregoing rules of contract law to this case, it will be necessary to briefly review the material facts.

The general dealings between Libelant and Respondent commenced with their signing a Master Contract wherein the general practice and procedure is established for all contractors engaging in government ship repair work.

This particular transaction was initiated by Respondent submitting to Libelant and other contractors an Invitation to Bid (Joint Ex. 3, Tr. p. 51) to furnish repairs for five lifeboats. The said Invitation to Bid was accompanied by a set of specifications (Ex. 3, p. 36). The first two pages of said specifications contained general provisions relative to the job and a statement that it was intended that the lifeboats were to be put into first-class condition. The following three pages, under the heading *"Category A Items,"* listed the specific repairs to be made to each of said lifeboats.

In Naval ship repair work *"Category A Items"* are the known repairs that will definitely have to be made, whereas "Category *B* Items" and "Category *C* Items" are the repairs for unknown or as yet undiscovered defects, or repairs that may or may not be required (Tr. p. 131-132; 186). Presumably, Respondent's surveyor, who inspected the lifeboats and

prepared the specifications, listed under *"Category A Items"* all defects and necessary repairs that were known or reasonably ascertainable from an inspection of the lifeboats. Otherwise, the failure to list repairs that were known to be necessary would amount to a positive fraud on the part of Respondent.

After receiving said Invitation to Bid and a copy of said specifications, Libelant inspected the lifeboats but only in reference to said *"Category A Items"* (Tr. p. 128-129). It is obvious that the said contractor did not care to speculate or gamble on what the Coast Guard Inspector might require after the built-in buoyancy tanks, steel floors and wooden flooring were torn out.

In any event, after inspecting the said lifeboats, Libelant determined that it would reasonably cost $3,775.00 to furnish and install the *"Category A Items"* of repair (Tr. p. 170). Libelant thereupon submitted its bid on the form provided by Respondent, and offered to furnish and install *"Category A Items"* only for the said price of $3,775.00 (Ex. H, Tr. p. 58). In this connection, Libelant's said bid expressly states:

> "Triple A Machine Shop, Inc. . . . offers and agrees, if this bid is accepted . . . to furnish any and all of the items of supplies or services *described on the reverse side of this bid at the price set opposite each item."*

And Libelant's bid, as set forth on the reverse side thereof, expressly states:

"*Category A Items*
Repair to five (5) lifeboats.
Total price $3,775.00
Category B Items

Item No.	*Price*	*Item No.*	*Price*

"

(Under Category B Items, spaces are provided for 34 items and price for each. These are all blank in Libelant's bid.)

Libelant submitted its said bid, and the same was accepted by Respondent without any question or qualification (Tr. p. 171). Thereafter, Libelant proceeded to install the "*Category A Items*" of repairs in accordance with its accepted bid (Tr. p. 171). During the course of the job and after the tanks and floors had been removed, Respondent's inspector determined that other repairs would be required to put the said lifeboats in proper condition (Agreed Facts, Tr. p. 70).

Since this newly discovered repair work (*Category B Items*) was not covered by the terms of Libelant's accepted bid, Respondent could have had this extra work performed in its own yards, or could have called for bids for said extra work, or it could require Libelant to furnish said extra repairs. Under Article 14 of said Master Contract, (Joint Ex. A, Tr. p. 25), Respondent could require Libelant to furnish and install the extra repairs that were not covered by its contract. In such event, the contractor has no right to hold up the job pending agreement as to the reasonable value of said extras.

Respondent chose this latter course and required Libelant to furnish said additional repairs hereinabove listed. Libelant did so, however, under the express notice to Respondent that Libelant would require payment of the reasonable value thereof. As noted above, it has been stipulated that the reasonable value of said additional repairs is $6,040.00, (Tr. p. 89), and that no part thereof has been paid (Agreed Facts, Tr. p. 68).

Libelant is in accord with Respondent's intent as expressed in the preamble pages of its said specifications, namely, that said lifeboats should be put in proper condition before being returned to service. But there was no expressed intent, and certainly no actual intent, that the contractor would be required to *gratuitously* furnish $6,040.00 worth of repairs that were not listed or mentioned in its bid, and which were not even discovered until long after Libelant's bid had been unqualifiedly accepted by Respondent (Tr. p. 179-180-182).

(Tr. p. 171):

"Q. (Mr. Cline) And when you returned your bid to the Military Sea Transportation Service—. You returned your bid to the Military Sea Transportation Service, did you?

A. (Mr. Blake) That is right, sir.

Q. And you were generally notified that it was accepted?

A. Yes, sir.

Q. Now was there any question raised by the Military Sea Transportation Service as to the

fact that your bid specifically on its face showed it covered only category 'A' items?
A. As specified, that is right, sir.
Q. Well, I say, was there any question raised by them as to your bid having—
A. No, sir—no, sir, they accepted our bid under category 'A', and the boats were put in our custody and we proceeded with repairs under category 'A', and they tried to throw in these additional repairs."

In brief, we must get down to the elementary questions of contract law as to whether an offer and acceptance constitutes the contract of the parties. It would seem that there could be no dispute as to this point. However, the decision of the Court below seems to have been based upon the false conclusion that Respondent's "Invitation to Bid" (Joint Ex. 3, p. 51) constituted the offer, and that Libelant's Bid (Joint Ex. 4, p. 58) constituted an acceptance of such offer. Obviously, the Invitation to Bid is not an offer, but is only a request for offers.

Corbin on Contracts, V. 1, p. 58 (1950):
"Frequently the same situation exists in the case of advertisements for bids on some building or other construction, public or private, or on the furnishing of supplies. *The advertisement is not an offer. It is a request for offers.*"

12 *Am. Jur.,* 526:
". . . A general offer must be *distinguished from a general invitation to make an offer.* Performance of the conditions of the former makes a

> legally binding contract, whereas compliance with the requirements of the latter involves nothing more than an offer, which may or may not be accepted by the party who issued the invitation therefor."

Likewise, the specifications (Ex. C, Tr. p. 36) do not constitute an offer. To the contrary, the specification is a factual statement of Respondent's intent, together with certain procedural matters, and a list of specific repairs that are known to be necessary, viz. *"Category A Items."* It was possible, however, for a bidder to incorporate all or any part of the specifications in its bid. For instance, a bidder could have made an offer to furnish all repairs known to be necessary or that might thereafter be discovered. Or a contractor could have submitted an offer to furnish certain specific repairs listed in said specifications. The latter is exactly what Libelant did. By its bid, it incorporated into its offer the portion of the specifications therein expressly designated and only that portion, namely, *"Category A Items."* (Tr. p. 170-171; 179).

Respondent could have rejected Libelant's bid, but instead, it accepted Libelant's bid as submitted (Tr. p. 171). In this connection, it will be noted that Respondent's Invitation to Bid never contemplated that a bidder would submit an offer to furnish anything other than *"Category A Items."* Paragraph 8 of the Invitation reads:

> "The successful bidder will furnish to the Contracting Officer a breakdown of the total bid

showing the price for each item, *such breakdown to be furnished immediately after the issuance of a Job Order* to the successful bidder."

How could a bidder submit a breakdown of repairs that were not known or discovered until the job was in progress? (Viz., Category B Items.)

In determining that the said additional repairs were within the obligation of Libelant's contract, the trial Court not only departed from the law and sought to write a new contract for the parties, but the Court departed from the "Agreed Facts" of the case and the evidence.

In the Pre-Trial Order (Tr. p. 68) the parties agreed upon all material facts in the case and the same were adopted by the Court. The "Agreed Facts" set forth in said order are now established facts in this case. The said "Agreed Facts" definitely establish that the hereinabove listed additional repairs were not covered by Libelant's contract, but were in fact extra and additional repairs which Respondent required Libelant to furnish.

"Agreed Facts; Pre-Trial Order.

12. That during the months of October and November, 1950 *libelant was required* by Military Sea Transportation Service Pacific *to perform additional work* and furnish labor and materials to effect certain repairs to the said lifeboats.

14. That in October 1950 Triple 'A' Machine Shop, libelant herein, was required to perform the *aforesaid additional* work on the said five lifeboats and libelant was advised by the Con-

tracting Officer, Military Sea Transportation Service Pacific, that *such additional* work was covered under the Specifications for Repairs No. MSTSP 5164, Job Order No. 10 and Master Ship Repair Contract MST-235. That libelant proceeded with said work under written protest and notice to the Contracting Officer that libelant would require payment of the reasonable value of *said additional work.*"

Not only was it established before trial that the said repairs were in addition to the repairs covered by Libelant's contract, but the evidence introduced at the trial removes all possible doubt on the question.

Respondent's main witness, Mr. Ames, the person under whose charge the said specifications were prepared, admitted on cross-examination that not one of the said items of additional repairs was listed in said "Category A Items" (Tr. p. 193-194):

"Q. (Mr. Cline) Now, you have read, have you, all of category A from the specifications?

A. (Mr. Ames) I have read pages 4 and 5.

Q. That is right, you read entirely all of the document, did you, from the place where it is headed category A items, you read all of them thereon, did you?

A. That's right.

Q. And nowhere in there is — withdraw that. And the categories you have just read covered by designation the five boats that are involved in this lawsuit, is that right?

A. Yes.

Q. And nowhere in that Category A is there one of these items that you referred to and that

are referred to in this letter, Exhibit D, as being the items of extra work claimed by Triple A?
A. Those items there are referred to in the other pages.
Q. But not category A, are they?
A. Not as so designated.
Q. That's right."
* * * * * * *

(Tr. p. 197):

"Q. (Mr. Cline) That's right. There is no question, Mr. Ames, as to a desire on your part to have the boats put in shape. But what I am asking you if it is not a fact that there is not one word in the specifications that says that if any extra work develops during the course of the job, that that will be part of category A?
A. (Mr. Ames) No, there is no mention of that."

Not only does Libelant's bid clearly state that it only covered *"Category A Items"* but Respondent's witness admitted, on cross-examination, that Respondent accepted the said bid on that basis.

(Tr. p. 190):

"Q. (Mr. Cline) Now, Mr. Ames, you will refer to this Exhibit 4 (Libelant's bid) and show me where there is a bid for anything other than the items involved in Category A?
A. (Mr. Ames) There are none.
Q. In other words, this bid expressly states—starts with a heading category A, repair five lifeboats, total $3,775?
A. That's right.

Q. And this bid for $3,775 for category A was accepted by the Government, is that right?
A. By the contract section, yes."

Under the rules of law hereinabove set forth, a legal contract came into being on Respondent's acceptance of Libelant's bid. The terms of that contract are established by the terms of the offer. And the same cannot be varied or enlarged by either the Respondent or the trial Court. It, therefore, clearly appears that the trial Court was in error in holding that Libelant was legally bound under the obligation of its contract to gratuitously furnish $6,040.00 worth of repairs in addition to the repairs specified in its bid.

The only other question that was before the trial Court was a question of fact, namely, "Did the controversy between the parties arise out of the plans and specifications?"

This question was raised by Respondent before trial on a motion to dismiss. The said motion was based on the contention that a prior determination by an administrative board was final and conclusive,

and that the Court is without jurisdiction to consider and determine said controversy. The trial Court ruled on this motion in its Findings of Fact and Conclusions of Law (Tr. p. 93), wherein the Court held that the prior administrative ruling was final and conclusive. We respectfully urge that the Court was in error.

To consider this question it will be necessary to briefly refer to the facts as established by the Pre-Trial Order (Tr. p. 68) and the record.

As noted above, Respondent's inspector discovered during the course of the repair job that additional repairs were necessary to put the lifeboats in proper condition. Respondent thereupon required Libelant to furnish said additional repairs as it had a right to do under said Master Contract. Libelant furnished the said extra repairs under notice that it would demand payment of the reasonable value thereof.

At the conclusion of the job, Libelant billed Respondent for the said reasonable value of said additional work. Respondent's local contracting officer rejected the said bill on the ground that Libelant was obliged under its contract to furnish said additional repairs without compensation therefor.

Libelant then gave notice of appeal under Article 14 and Article 5(j) of the said Master Contract. Respondent thereupon designated its Contract Advisory Board in Washington, D. C., as the Agency to hear and determine said appeal. The said appeal board

thereafter made its ruling (Ex. I, Tr. p. 60) under which it made two determinations, namely:

1. That the controversy arose out of the specifications, and therefore Libelant's appeal could only be considered under said Article 5(j) of the said Master Contract.

2. That in determining said appeal under Article 5(j) the board ruled that the specifications "as bid upon by the contractor" included all repairs furnished by Libelant, and that therefore Libelant was not entitled to compensation for the said additional repairs.

After receipt of said administrative ruling, Libelant filed the above entitled action. Shortly before trial, Respondent filed a motion to dismiss, (Tr. p. 67), as aforesaid, and the said motion was argued, briefed, and submitted before Judge Louis E. Goodman. Thereafter, Judge Goodman filed his written opinion (Tr. p. 87) under the terms of which he determined:

1. That, while the Master Contract provides that administrative decisions under Article 14 are final and conclusive, the said contract does *not* provide that decisions under Article 5(j) are final or conclusive.

2. That Article 5(j) applies to "any questions regarding or arising out of the interpretation of plans and specifications."

3. That on said motion to dismiss, the Court did not have sufficient facts before it to determine whether

the controversy was one that would come under Article 5(j), and that therefore the ruling on said motion to dismiss was reserved until the trial.

There was therefore reserved for the trial Court's determination the question of fact as to whether the controversy presented a question regarding or arising out of the plans and specifications.

There would seem to be no room for doubt as to this question. Respondent's local contracting officer decided that the controversy arose out of the specifications, and, hence, Article 5(j) applied (Ex. B. Tr. p. 84). The same determination was made by said appeal board, (Ex. I, Tr. p. 60), and the trial Court likewise made the same determination in its Findings of Fact and Conclusions of Law (Tr. p. 93). The trial Court should therefore have denied said motion to dismiss; and its said conclusion of law that the said decision of the administrative board was final and conclusive was in error.

The provisions of Article 5(j) of the Master Contract (Joint Ex. I, p. 25) are clear and without ambiguity. As stated in Judge Goodman's said Opinion, "Article 5(j) does *not* specify that the Commander's decision shall be final and conclusive." Certainly, the Court had no power to write into the said provisions of the Master Contract language which would deny to the contractor his constitutional right of redress in Court. While a person may by contract waive his right to judicial review or redress in Court, such

waiver cannot be presumed, or read into a contract that is silent on the subject.

The Penker Construction Co. v. U.S., 96 Ct. Cl. Reports 1, p. 37:

> "It is well settled that provisions preventing resort to the courts to settle the rights of the parties are to be strictly construed against excluding this right. This remedy will not be denied *unless the language of the contract makes such a conclusion inescapable.* Mercantile Trust Co. v. Hensey, 205 U.S. 298; Central Trust Co. v. Louisville, St. Louis & T. R. Co., 70 Fed. 282; Zimmerman v. Marymor, et al., 290 Pa. 299; and other cases cited in 54 A.L.R., 1255."

It is, therefore, respectfully urged that the trial Court's Findings of Fact and Conclusions of Law, on which it based its judgment, are in error in holding that the determination of the administrative board is final and is conclusive on Libelant and the Court alike.

It would seem that we need go no further! If the trial Court had jurisdiction to render a judgment,

and if the extent of Libelant's contractual obligation was established by the terms of its written offer as accepted by Respondent, then it would appear that a reversal is mandatory.

The other specifications of error hereinabove noted are likewise serious and vital. Although we feel that the trial Court should be reversed for its erroneous determination that Libelant's contractual obligation included repairs that were expressly excluded from its offer, we will nevertheless briefly refer to other errors hereinabove noted. To do otherwise might be misconstrued as a waiver of said points.

FINDINGS OF FACT.

We therefore turn to a consideration of the Findings of Fact (Tr. p. 93) and the Court's error in:

1. Omitting essential established facts.
2. Establishing "facts" that are either contrary to or not supported by the evidence.
3. Setting forth conclusions of law as "facts."

As noted above, pre-trial procedure was followed in this case. The Pre-Trial Order (Tr. p. 68) sets forth all of the material facts of this case under the heading of "Agreed Facts". This document was signed and approved by counsel for both parties and was thereupon signed and filed by the Court.

Respondent's counsel prepared the said Pre-Trial Order, including said "Agreed Facts". It therefore

cannot be claimed that Respondent was not familiar with the same. Respondent likewise prepared the Findings of Fact that were signed by the trial Court. It will be noted, however, that in preparing said Findings, material and essential facts established by the Pre-Trial Order were omitted. We refer to Paragraphs Nos. 7, 8, 12, 13, 14, 17, and 18 of the "Agreed Facts" set forth in said Pre-Trial Order, said paragraphs having been hereinabove quoted in full. The said facts having been approved by the parties and adopted by the Court are now established facts in the case, and cannot be ignored or omitted from the Findings of Fact by the trial Court. To hold otherwise would be to make a mockery of all pre-trial procedure.

The erroneously omitted facts establish in substance:

1. That Libelant submitted its bid for repairs to five lifeboats for a total price of $3,775.00.

2. That Respondent accepted Libelant's said bid.

3. That Respondent required Libelant to furnish additional repairs.

4. That said additional repairs are the subject matter of Libelant's third cause of action, and for which Libelant is asking judgment in the sum of $6,342.00 as the reasonable value thereof.

5. That Respondent contended that the said additional repairs were covered by Libelant's contract. That Libelant furnished said additional repairs under protest and on express notice that Libelant would re-

quire payment of the reasonable value of said additional repairs.

6. That on refusal of Respondent to pay for said extra work, Libelant filed an appeal under Article 5(j) and Article 14 of the Master Contract.

7. That Respondent's appeal board refused to consider Libelant's appeal under Article 14, but did accept and rule on the appeal under Article 5(j) and and did rule that the said extra repairs were covered by Libelant's contract.

Another prejudicial omission appears in the trial Court's Finding No. V, wherein certain selected portions of the preamble of the specifications are quoted, but there is a complete omission of the portion of the specifications entitled "Category A Items". This is the only part of the specifications that was referred to or incorporated in Libelant's bid. If any part of the specifications is to be included in the Findings, then the portion on which Libelant submitted a bid certainly should be included.

ERRONEOUS CONCLUSIONS OF LAW DESIGNATED AS "FACTS".

Finding of Fact VII is actually a conclusion of law. The Court there states that Libelant did "offer and agree . . . to completely repair and recondition . . . five lifeboats . . . at a total cost of $3,775.00 . . ." This legal conclusion is clearly erroneous.

The only testimony on the subject was from Libelant's witness Mr. Blake, who testified that in figuring the job and in submitting a bid only "Category A Items" were considered (Tr. p. 170-171; 179). The only other evidence on the subject, other than the "Agreed Facts" of the Pre-Trial Order, was the written bid itself. It certainly cannot be stated as a "fact" in the case or as a well-founded conclusion of law that Libelant's bid contains an offer to furnish any repairs other than "Category A Items".

Likewise, Finding No. XI is not a finding of fact but is an erroneous conclusion of law. The Court therein states that the repairs which Libelant was required to furnish "did not comprise extra work to be performed by the Libelant." There is no evidence on which the said statement may be based as a "fact". Nor can it be supported as a legal conclusion for the reason that the terms of an offer, when accepted, establish the terms of the contract, and the offer was to furnish "Category A Items" only. Furthermore, the said "Finding" is directly opposed to the "Agreed Facts" established in the case by the Pre-Trial Order (Tr. p. 68). In Paragraph No. 12 of said "Agreed Facts" and three times in Paragraph No. 14, the repairs here in question were referred to and established to be "additional work".

FINDINGS CONTRARY TO THE EVIDENCE.

Finding No. VI determines:

1. That Libelant "made a thorough inspection of the five lifeboats as to their condition and need for repairs" before submitting its bid.

2. "That all items requiring repair were visible and open to inspection by Libelant's agent."

The uncontradicted evidence is that Libelant's agent inspected the lifeboats only as to "Category A Items". There is not one word in the record that would sustain the Court's said statement that Libelant "made a thorough inspection of the five lifeboats as to their condition and need for repairs".

Likewise, the evidence is directly opposed to the Court's finding "that all items requiring repair were visible and open to inspection". The said finding is not only contrary to the evidence, but is also directly at variance with Finding No. X. The evidence established without conflict is that the built-in buoyancy tanks and steel floors and wooden floor boards made it impossible to see the condition of the interior of the boats. It was not until after the boats had been dismantled in Libelant's yard that an inspection could be made to ascertain whether there would be any repairs required other than "Category A Items". This is established by Finding No. X which is at variance with Finding No. VI.

Finding No. VII likewise is contrary to the evidence in that the said finding states that Libelant's "bid was submitted on a basis of computations as to

work needed to be done . . .'' Libelant's witness, Mr. Blake, was the one who made the estimate and submitted the bid on behalf of Libelant. He testified that he made an inspection only as to ''Category A Items'' and submitted a bid to furnish only ''Category A Items'' (Tr. p. 170-171). There is no other testimony or evidence on the subject. How could it have been otherwise? How could Libelant guess whether additional defects would be found when the floors and tanks were removed from the boats? How could a bidder make ''computations as to work needed to be done'' when no one knew or could have ascertained at that time that any additional repairs would be found necessary? Surely, Respondent cannot claim that it knew of the defects which the Court's Finding No. X states were subsequently discovered by its inspector during the course of the job. If so, then its failure to list the same in ''Category A Items'' would constitute a fraudulent concealment and a positive fraud on the bidder. Of course, the fact is that no one knew that there were any defects in the lifeboats other than ''Category A Items'' until long after Libelant's bid was accepted.

THE CONCLUSIONS OF LAW ARE CONTRARY TO LAW.

The Court's *Conclusion of Law No. I* is the decision of the case and the basis for the Court's judgment in favor of the Respondent. The said Conclusion No. I is directly contrary to law. By its said conclusion, the Court determined that the extra work here in

question was "contemplated by and provided for in the specifications" and from this the Court ruled that "Libelant is not entitled to extra pay above and beyond the contract price . . ."

The Court has here misconstrued the most elementary rules of contract law. The question was not what was "contemplated by and provided for *in the specifications,*" but, to the contrary, the question was what was "contemplated by and provided for" in *Libelant's bid.* There is no question but that, in drawing the specifications and at all other times, Respondent intended to have the lifeboats put in first-class condition before returning them to service. This does not mean, and the specifications do not state, that the successful bidder will have to gratuitously furnish all repairs that may thereafter be found necessary.

Even if the Court were to read into the *specifications* a provision to the effect that the contractor would have to repair all subsequently discovered defects without any compensation therefor, this still would not give legal support to said Conclusion of Law No. I.

Libelant had a right to submit an offer on any terms it saw fit. If Libelant had chosen to do so, it could have submitted a bid which was directly and expressly at variance to the specifications. Likewise, Libelant's bid could have been submitted for repairs to only one of the five lifeboats, if Libelant had chosen to do so. In like manner, Respondent had the right to reject Libelant's bid. But Respondent ac-

cepted said bid exactly as it was submitted, and the said bid is for *"Category A Items" only.* The Court, therefore, cannot legally base a judgment on what the Court concludes was "contemplated by the *specifications.*"

The specifications were a legal concern of the trial Court only to the extent that the same were incorporated into Libelant's bid. Libelant did incorporate into its bid by reference a portion of said specifications, namely, the last three pages thereof following the heading "Category A Items". It is, therefore respectfully urged that the Court was clearly in error in determining that Libelant was not entitled to compensation for the said extra work because of what "was contemplated by the *specifications*" as a whole.

By its *Conclusion of Law No. II,* the Court determined that the decision of the administrative appeal board under Article 5(j) of the Master Contract "was final and conclusive as to Libelant and Respondent."

Conclusion of Law No. III is to the same effect, except that it goes a bit further in holding that the decision of the appeal board under Article 5(j) of the Master Contract "constituted a final and conclusive determination of the dispute as between the contracting parties and therefore cannot be set aside by the Court."

For brevity, said Conclusions of Law Nos. II and III will be here considered together, as they are based upon the same erroneous conclusion of law. As noted

above, the question of law involved in said Conclusions Nos. II and III was disposed of prior to trial by the Court below in its Memorandum Opinion ruling on Respondent's Motion to Dismiss. In said Opinion, the Court determined that:

1. Where the controversy between the parties arises "out of the plans and specifications", an appeal by the contractor to the Respondent's appeal board is governed by Article 5(j) of the Master Contract.

2. That Article 14 of the Master Contract does not apply to such an appeal.

3. That, while Article 14 provides that an appeal under the said article is final and conclusive, there is no such provision in Article 5(j).

4. That the Court withheld its ruling on Respondent's Motion to Dismiss solely because the Court did not have sufficient evidence before it to determine whether Libelant's claim arose "out of the plans and specifications." The said Opinion clearly indicates that Respondent's Motion to Dismiss would have been denied if the Court had been certain that the controversy was one that came within the provisions of Article 5(j) of the Master Contract.

The force of said Memorandum Opinion is not necessary, however, to establish that said Conclusions of Law Nos. II and III are contrary to law.

It has not been nor can it be contended that the controversy between the parties did not arise "out of the interpretation of plans and specifications". Re-

spondent's local Contracting Officer expressly so ruled (Ex. B, Tr. p. 84). Likewise, Respondent's appeal board, namely, Contract Advisory Board, made the same determination (Ex. I, Tr. p. 60). If there was any room for doubt remaining, it was removed by the trial Court in its Findings, as prepared by Respondent. In its Finding No. XI, the Court found that the extra work here in question was required "in order to conform with the *terms and conditions of the specifications* for Repairs MSTSP 51-64"; similar findings appear in the Court's Findings Nos. XII and XIII.

There is no need to labor the point further. Libelant's appeal to Respondent's administrative appeal board came within the provisions of Article 5(j) of said Master Contract and only under said Article 5(j). We must then look solely to the provisions of said Article 5(j) to ascertain whether Libelant waived its right to judicial review and redress in Court when it signed said Master Contract.

It serves no purpose to consider what the position of the parties would have been if Libelant's appeal had been decided under Article 14 of the Master Contract. We readily acknowledge that Article 14 clearly and expressly states that a decision on an appeal under Article 14 is final and conclusive. But, in the instant case, the appeal board refused to entertain an appeal under Article 14 and expressly decided Libelant's appeal under Article 5(j) (Agreed Facts, No. 18, Tr. p. 72). Article 5(j) contains no waiver of a right to a day in Court, either expressly or by impli-

cation. And the trial Court had no power to write a new contract for the parties. The right to redress in Court is one of our most cherished rights, and the same may not be taken away by a trial Court reading into a contract a waiver that was not placed in the contract by the parties. As stated in *The Penker Construction Co. vs. U. S.,* 96 Ct. Cl. Reports 1, p. 37:

> "It is well settled that provisions preventing resort to the courts to settle the rights of the parties are to be strictly construed against excluding this right. This remedy will not be denied unless the language of the contract makes such a conclusion inescapable."

Since Article 5(j) of the Master Contract is silent on the subject, the trial Court was clearly in error in holding that a decision on an appeal under Article 5(j) "constituted a final and conclusive determination of the dispute as between the contracting parties and therefore cannot be set aside by the court."

We are uncertain as to the meaning of the Court's *Conclusion of Law No. IV,* wherein the Court states "that Libelant has failed to prove a cause of action . . ." Apparently, this is another way of stating that Libelant's cause of action is barred by the decision of Respondent's administrative appeal board. If so, we refer to the foregoing pages relative to Conclusions of Law Nos. II and III to show that said conclusion of law is contrary to law.

If, on the other hand, the Court meant by its Conclusion of Law No. IV that there was insufficient

evidence to sustain Libelant's said cause of action, then the Court was guilty of judicial error. The "Agreed Facts" of the case, as established by the Pre-Trial Order, set forth "That . . . Libelant was required . . . to perform *additional* work and furnish labor and materials to effect certain repairs to said lifeboats." This was amplified by the stipulation that the parties made and filed during the trial, wherein the extra work here in question was listed in detail, and it was expressly agreed that the same was of the reasonable value of $6,040.00 (Tr. p. 89). There is nothing in the record at variance with the said agreed facts and stipulation.

It is therefore respectfully urged that the said Conclusions of Law are contrary to law and the facts of the case and that the judgment based thereon is without legal support.

As an indication of the confused reasoning of the trial Court, attention is called to the fact that after the trial Court made its order for "judgment in favor of defendant . . .", the said Court made its aforesaid Conclusion of Law wherein it was determined that

Libelant had no right to redress in Court. In other words, if the said Conclusion of Law were sound, the Court had no jurisdiction to make any order other than an order granting Respondent's Motion to Dismiss.

Carrying the confusion further, the Court chose to ignore its said Order for Judgment. Instead of making such judgment, the Court made and entered a "Final Decree" on March 10, 1954 (Tr. p. 92) under which it was "Ordered, adjudged and decreed that the above entitled action be, and the same is, hereby dismissed. . ." The inconsistency of the said "Final Decree" with said Order for Judgment was so obvious that Respondent filed a motion to have said decree modified so that the same would conform with the said Order for Judgment. Under date of April 5th, 1954, the Court granted said motion and made its Modified Final Decree (Tr. p. 108) granting judgment to defendant instead of dismissing the action. While the said Modified Final Decree does conform with the Court's original Order for Judgment, it is obvious that it cannot be sustained in the face of the Court's said Conclusions of Law, in which the Court ruled that the decision of the administrative appeal board was final and that Libelant could not state a cause of action based upon its said claim. It appears that the trial Court recognized that its said Conclusions of Law were erroneous when it granted Respondent's motion to modify said "Final Decree" so as to change it from a dismissal to a judgment for defendant.

For the reasons set forth above and in the foregoing pages, the trial Court should have granted Libelant's motion to amend the said Findings of Fact and Conclusions of Law (Tr. p. 104) and should have granted Libelant's Motion for New Trial (Tr. p. 105). We respectfully urge that the trial Court was guilty of judicial error in refusing to grant said motions.

It is therefore respectfully urged that the judgment of the trial Court should be reversed, with direction for judgment in favor of Libelant in the sum of $6,040.00.

Dated, San Francisco, California,
February 14, 1955.

Respectfully submitted,
J. THADDEUS CLINE,
Proctor for Libelant.

(NOTE): All emphasis appearing in the foregoing pages has been added.